

# In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 99-533V

(Filed: July 13, 2007)

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CASEY HOCRAFFER,

Petitioner,

v.

SECRETARY OF HEALTH and  
HUMAN SERVICES,

Respondent.

\* \* \* \* \*

## ORDER ON PETITIONER'S MOTION FOR REVIEW

Pending before the court is a Motion for Review filed by Petitioner, Casey Hocraffer ("Petitioner" or "Hocraffer"), pursuant to Appendix B ("App. B") of the Rules of the United States Court of Federal Claims ("RCFC"), Vaccine Rule 23. Ms. Hocraffer seeks review of the Chief Special Master's Decision on Remand, Hocraffer v. Sec'y of HHS, No. 99-533V, 2007 WL 914914 (Fed. Cl. Spec. Mstr. Feb 28, 2007), which determined that Ms. Hocraffer suffered from Reye's Syndrome for approximately thirty days and awarded her \$5,000 for pain and suffering and emotional distress and \$841.50 in past unreimbursed insurance co-payments. Id. at \*3-4, 7.

## BACKGROUND

On July 29, 1999, Ms. Hocraffer filed a suit for compensation under the National Childhood Vaccine Injury Act of 1986, as amended, 42 U.S.C. § 300aa-1-34 ("Vaccine

Act” or “Act”). Ms. Hocraffer claimed that she suffered injuries resulting from Hepatitis B vaccinations that she received on November 7, 1996, and December 11, 1996. On March 11, 2004, Special Master E. LaVon French issued a decision dismissing the case. Hocraffer v. Sec’y of HHS, No. 99-533V, 2004 WL 627777 (Fed. Cl. Spec. Mstr. March 12, 2004). On January 26, 2005, this court reversed the decision of Special Master French and remanded the case for a decision on damages consistent with the court’s opinion. Hocraffer v. Sec’y of HHS, 63 Fed. Cl. 765 (2005). In the January 2005 decision, the court found that Petitioner had suffered from Reye’s Syndrome which was caused by the Hepatitis B vaccination she received and that the Reye’s Syndrome led to her hospitalization and surgical intervention, i.e. the lumbar puncture. Id. at 779. The court further found that Petitioner had not established that she suffered any long-term effects from her illness. Thus, the court concluded that the “Petitioner did not prove by a preponderance of the evidence that she had any sequelae from Reye’s Syndrome after it resolved itself shortly after she was released from the hospital in late 1996.” Id. On remand, the Special Master was directed to render a decision on damages consistent with the court’s findings and conclusions. Id. at 781.

On remand, this case was reassigned to the Chief Special Master. In the first fifteen months following remand, both parties filed memoranda on damages, including expert reports and affidavits, proposing the appropriate period of damages that should be considered by the Chief Special Master. Resp’t Resp. at 2-3. Petitioner’s memoranda, including affidavits from Dr. James E. Heubi, asserted that a thirty day damages period was appropriate, while Respondent’s expert report, from Dr. Alan I. Brenner, concluded that a fifteen day damages period was appropriate. Resp’t Resp. at 3. Subsequently, on May 15, 2006, Petitioner filed an amended damages notice seeking to demonstrate that she suffered long-term effects from Reye’s Syndrome. Id. The Chief Special Master did not allow Petitioner to file the expert report because he felt that this court’s 2005 Opinion precluded him from considering evidence of damages beyond the time period shortly after Ms. Hocraffer was released from the hospital. Pet’r MFR at 3.

On July 14, 2006, Petitioner filed a motion in this court seeking reconsideration of the court’s January 2005 opinion so as to allow Petitioner to present new evidence to establish that she suffered long-term effects from Reye’s Syndrome. On September 11, 2006, the court denied Petitioner’s motion, finding that if the motion was “in effect one for reconsideration of the liability determination,” it was untimely. Order Denying the Petitioner’s Motion to Revise the Court’s January 26, 2005 Decision, September 11, 2006 (“2006 Order”), at 2. The court also found that because the case was bifurcated between liability and damages determinations, and that because the case had entered the damages phase, jurisdiction over that phase was with the Chief Special Master. Id.

On February 28, 2007, the Chief Special Master issued a Decision on Remand, Hocraffer v. Sec’y of HHS, 2007 WL 914914, which accepted the testimony of Dr. Heubi, presented by Petitioner, that the appropriate damages period for determining Petitioner’s award was thirty days. Id. at \*2. The Chief Special Master awarded Petitioner \$5,000 for pain and suffering and emotional distress, id. at \*3, and \$841.50 for past unreimbursed insurance co-payments, id. at \*7. On March 26, 2007, Petitioner filed a motion for review of the Chief Special Master’s decision in this court.

Petitioner contends that, in making the damages determination, the Chief Special Master ignored the testimony of one of Ms. Hocraffer’s expert witnesses, Dr. Nathaniel Ratnasamy, which she asserts would have demonstrated that she was entitled to damages for a period of at least six months. Ms. Hocraffer also contends that the Chief Special Master failed to properly calculate damages and that the pain and suffering award was inadequate and unreasonable. Accordingly, Ms. Hocraffer asks that this court reverse the Chief Special Master’s decision regarding damages and remand it so that additional evidence concerning the time period for which she should be awarded damages can be considered.

The Secretary of Health and Human Services (“Respondent”) contends that the Chief Special Master’s damages determination was appropriate and should be affirmed. In particular, Respondent asserts that the Chief Special Master considered all relevant evidence, as required by RCFC, App. B, Vaccine Rule 8(c), and that he appropriately limited the damages determination to thirty days as required by this court’s 2005 Opinion. Hocraffer v. Sec’y of HHS, 63 Fed. Cl. at 765 (holding that Petitioner did not prove “that she had any sequelae from Reye’s Syndrome after it resolved itself shortly after she was released from the hospital in late 1996”). Respondent also contends that the Chief Special Master’s pain and suffering award was not made in error.

For the reasons set forth below, the petitioner’s motion for review is **GRANTED-IN-PART**. Because the court finds that the Chief Special Master’s damages determination should be remanded, the court does not reach Petitioner’s other arguments regarding the appropriateness of the damages determination.

## **DISCUSSION**

In deciding a motion for review of the Special Master’s decision, this court may take one of several actions: (A) uphold the findings of fact and conclusions of law of the Special Master and sustain the Special Master’s decision; (B) set aside any findings of fact or conclusions of law of the Special Master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and issue its own findings of

fact and conclusions of law; or (C) remand the petition to the Special Master for further action in accordance with the court's direction. 42 U.S.C. § 300aa-12(e)(2); RCFC, App. B, Vaccine Rule 36(b). According to RCFC, App. B, Vaccine Rule 8(c), the Chief Special Master was required to "consider all relevant and reliable evidence, governed by principles of fundamental fairness to both parties." Factual determinations made by the Chief Special Master should be overturned only if they are found to be arbitrary and capricious. See, e.g., Walther v. Sec'y of HHS, 485 F.3d 1146, 1148 (Fed. Cir. 2007); Pafford v. Sec'y of HHS, 451 F.3d 1352, 1355 (Fed. Cir. 2006).

Petitioner objects to the Chief Special Master's refusal to allow her to offer certain evidence, including an expert pediatric neurologist's report regarding sequelae from Reye's syndrome and medical articles concerning the prognosis of individuals who have been afflicted with Reye's Syndrome, in the damages phase of this case. Petitioner asserts that "the damages and entitlement stages of vaccine proceedings are wholly different forums, separated by the vaccine act as needing distinct and different legal proofs." Pet'r Supp. Br. at 3. She argues that "[s]he is not attempting to relitigate the entitlement issue but to have her full share and opportunity to present evidence in the damages phase of this proceeding." Id. Petitioner contends that, in the "entitlement phase," she introduced enough evidence to meet jurisdictional requirements, and that "she should not be constrained by entitlement phase rulings meant to address only [those jurisdictional issues]." Id. at 5.

Respondent contends that Petitioner's motion for review is simply a veiled attempt to relitigate the issue of entitlement, an issue which Respondent argues was already decided, as a final judgment, by this court in its 2005 Opinion. See Suel v. Sec'y of HHS, 192 F.3d 981, 984 (Fed. Cir. 2000) (holding that the Court of Federal Claims "reversal of the initial entitlement claim was a final judgment"). Respondent asserts that the only issue that Petitioner can raise before this court on a motion for review of the Chief Special Master's damages determination is whether the damages were awarded on a rational basis, and that the Chief Special Master's reliance on Dr. Heubi's testimony to determine damages, following this court's January 2005 Opinion, was rational and entirely appropriate. Respondent further contends that Petitioner's request that the court accept Dr. Heubi's testimony regarding causation, but ignore his testimony regarding sequela, is incongruous, because if Dr. Heubi's testimony was found to be credible, Respondent asserts it should be accepted by the court in its entirety.

Although the court generally agrees with Respondent that Petitioner's attempt to add a new expert and submit other medical evidence at this late date is very problematic, the court is not prepared to find, in the unique circumstances of this case, that this new evidence should be excluded from consideration. Under RCFC, App. B, Vaccine Rule 8(c), the Special Master is directed to "consider all relevant and reliable evidence,

governed by principles of fundamental fairness to both parties.” Where, as here, the liability and damages phases of the case are bifurcated, and the damages phase is heard by a different Special Master, the court will allow Petitioner to present evidence in the damages phase to demonstrate what she believes to be the full extent of the damages she suffered. Assuming the new evidence is reliable, the Chief Special Master may consider this evidence, as well as any evidence offered by Respondent in response to Petitioner’s submissions.

### **CONCLUSION**

Accordingly, Petitioner’s motion for review of the decision on remand is **GRANTED-IN-PART**. The court **REMANDS** this case to the Chief Special Master so that he may consider, if reliable, the evidence that Petitioner seeks to present, and any evidence Respondent seeks to present in response, for the limited purpose of establishing the appropriate damages period and making a damages determination. The Chief Special Master shall have six months within which to complete a review of the additional evidence submitted by both parties; if more time is necessary, he shall provide the court with a Status Report after six months.

**IT IS SO ORDERED.**

s/Nancy B. Firestone  
NANCY B. FIRESTONE  
Judge